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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 331

JULIAN N. FRISBIE, WARDEN, STATE PRISON OF SOUTHERN MICHIGAN, JACKSON, MICHIGAN,

Petitioner,

vs.

SHIRLEY COLLINS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENT

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SUBJECT-INDEX

	Page
I. Opinion of the Court Below	1
II. Basis of Jurisdiction	2
III. Questions Presented	2
IV. Statement of the Case	2
V. Summary of Argument	2
VI. Argument	3
VII. Conclusion	11

Table of Cases Cited

Adams v. *New York*, 192 U. S. 585	3
Boyd v. *O'Grady*, 121 F. (2d) 146	10
Brown v. *Frisbie*, 178 F. (2d) 271	4, 7
Chatwin v. *U. S.*, 326 U. S. 455	5
Collins v. *Frisbie*, 189 F. (2d) 464	1
Cook v. *Hart*, 146 U. S. 183	3
Darr v. *Burford*, 339 U. S. 200	7
Ex parte Davis, 318 U. S. 412	10
Ex parte Henry Hawk, 321 U. S. 114	8
Ex parte Morgan, 78 F. Supp. 756; aff'd., 175 F. (2d) 404; cert. denied, 338 U. S. 827	10
Gooch v. *U. S.*, 297 U. S. 124	5
Hampson v. *Smith*, 162 F. (2d) 334	7
In re Little, 129 Mich. 454 (1902)	3
In re Reno, 321 Mich. 497	8
Johnson v. *Zerbst*, 304 U. S. 458	8
Ker v. *Illinois*, 119 U. S. 436	3
Lascelles v. *Georgia*, 148 U. S. 537	3
Mahon v. *Justice*, 127 U. S. 700	3
People v. *Maher*, 329 Mich. 155; cert. denied, 340 U. S. 949	7
Pettibone v. *Nichols*, 203 U. S. 192	3
Potter v. *Dowd*, 146 F. (2d) 244	10
State v. *Garrett*, 57 Kan. 132 (1896)	4
State v. *Simmons*, 39 Kan. 262 (1888)	4

Page

State v. *Wellman*, 102 Kan. 503 (1918) 4
Thomas v. *Duffy*, 191 F. (2d) 360 (1951) 10

CONSTITUTIONAL PROVISIONS AND STATUTES CITED

Title 18, U. S. C., Sec. 1201 3
Title 28, U. S. C., Sec. 1254 (1) 2
Title 28, U. S. C., Sec. 2254 ..... 8, 10
Federal Constitution, Article 4, Sec. 2 (2) 11
Federal Constitution, Fourteenth Amendment 2

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BRIEF FOR RESPONDENT

I

Opinion of the Court Below

This is reported as *Collins v. Frisbie, Warden,* 189 F. (2d) 464. As related in Petitioner's brief, the opinion (p. 14) and dissent (p. 20) appear in the transcript of record, together with the findings of the District Court (pp. 11-12).[1]

[1] For convenience, and in conformity with Petitioner's brief, references to the printed transcript of record are set forth in parentheses. Page references to authorities and references to pages in Petitioner's brief are not so inclosed; no reference is made herein to the brief annexed in support of Petitioner's petition for writ of certiorari.

II

Jurisdiction

Judgment of the United States Court of Appeals for the Sixth Circuit, (p. 14);
Petition for rehearing (p. 22);
Petition denied, June 25, 1951 (p. 29);
Petition for writ of certiorari, September 17, 1951;
Petition for writ of certiorari granted, November 5, 1951;
28 U. S. C., Section 1254 (1), 1948.

III

Questions Presented

1. Respondent accepts as accurate the first Question presented in Petitioner's brief, page 3, with a single exception: That all of Respondent's rights under the due process clause of the Fourteenth Amendment were not preserved.

2. Respondent accepts the second Question presented in Petitioner's brief, page 4, reserving however the right to show all of the exceptional circumstances requiring federal relief without limitation as to Respondent's scope of pleading them heretofore in proper person.

IV

Statement of the Case

Respondent accepts the statement found in Petitioner's brief, pages 8-11, inclusive.

V

Summary of Argument

1. The unlawful seizure and kidnapping of Respondent in Illinois by Michigan officers, who abducted or carried

away Respondent to Michigan, there to be held and tried for a prior crime in that State, would invalidate the jurisdiction of the Michigan trial court. "A state may not lawfully try, convict and punish a person brought within its territorial confines by force and violence exercised by its officers in violation of" the Federal Kidnapping Act (p. 19).

2. Respondent is entitled to a hearing in the appropriate United States District Court upon the merits of his petition for writ of *habeas corpus* without having exhausted his state court remedies, because of "exceptional circumstances" which exist in this cause.

VI

Argument

1. A state may not lawfully try, convict and punish a person brought within its territorial confines by force and violence exercised by its officers in violation of the Federal Kidnapping Act.[2]

The general rule is stated at page 14 of Petitioner's brief, namely, that a criminal trial court's jurisdiction is not impaired by the manner in which an accused is brought before it from another jurisdiction. "Courts have shown no inclination to scrutinize too closely the means used by police officers to secure fugitives from justice, and bring them before the courts for trial." *In re Little*, 129 Mich. 454 (1902). The universal rule to which Petitioner's brief adverts was set down in *Ker* v. *Illinois*, 119 U. S. 436, in which the offended jurisdiction was a foreign sovereign. The *Ker* holding and the cases which have followed it[3] crystal-

[2] 47 Stat. 326; 48 Stat. 781; 18 U. S. C. Sec. 1201.

[3] *Mahon* v. *Justice*, 127 U. S. 700; *Cook* v. *Hart*, 146 U. S. 183; *Lascelles* v. *Georgia*, 148 U. S. 537; *Adams* v. *New York*, 192 U. S. 585; *Pettibone* v. *Nichols*, 203 U. S. 192; etc.

lized the general rule [4] before a federal statute against kidnapping was enacted. Some of the principal cases which have upheld the power of state tribunals to prosecute accused persons dragged into its jurisdiction, neatly avoiding questions of "due process" en route, speculated upon the wisdom of or expressed a wish for a federal statute which would, in effect, relieve the courts of ruling by processes of sophisticated reasoning that an accused citizen does not have certain inviolable rights which he commonly believes are his Constitutionally. This judicial yearning is expressed in *Mahon* v. *Justice, supra,* at page 285 of that opinion. In *Ker* v. *Illinois, supra,* at page 423, the wish is fathered for "some positive provision (of the Constitution or) of the laws of this country" by which persons so seized might be protected. It is seen in the dissent in *Pettibone* v. *Nichols, supra,* where kidnapping was said to be "a crime, pure and simple"; but had not then been the subject of specific prohibition by Congress. The major question, then, which is now before this Court is whether the Federal Kidnapping Act interposes the safeguard, long-needed, to protect the accused from those territorial and coercive excesses which defeat the obvious intent of the Constitution as evidenced in its extradition procedure and in the Fourteenth Amendment. This Court of Appeals has so held, in the case at bar and in *Brown* v. *Frisbie,* 178 F. (2d) 271 (C. A. 6th 1949).[5] The logic and authority of this Circuit's two rulings may not be lightly dismissed as in Petitioner's brief, page 12, footnote 12; the cases there cited

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[4] Which, if "universal", ignores a contrary view in Kansas. Cf. *State* v. *Simmons,* 39 Kan. 262, 18 P. 177 (1888); *State* v. *Garrett,* 57 Kan. 132, 45 P. 93 (1896); *State* v. *Wellman,* 102 Kan. 503, 167 P. 1052 (1918).

[5] The Court of Appeals did not actually cite the Federal Kidnapping Act as the basis of its Brown holding; but the ruling was tantamount to that and the same Court quite evidently so regards its *Brown* ruling in its opinion in the *Collins* case.

and in footnote 13, even where they post-date the Federal Kidnapping Act, do not directly raise the question of that statute.

Petitioner's brief, in handling *Gooch* v. *U. S.*, 297 U. S. 124, does not seriously contend that the words "or otherwise" in the amended Federal Kidnapping Act do not embrace and include, if the Act is otherwise applicable, the kidnapping by police officers of a fugitive and transporting such accused to another jurisdiction for trial. It is not open to question that, save for specific exceptions, the statute covers "every possible variety of kidnapping followed by interstate transportation". *Chatwin* v. *U. S.*, 326 U. S. 455, 463. Petitioner skirts this by citing Mr. Justice Murphy's comment in the *Chatwin* case, *supra*, as to the "purpose" of the Act in relation to morals cases, thence moves to tie in public policy aspects of the absence of an asylum state restoration provision, Michigan's projected inability to re-try Respondent, the strangulation of state sovereignty, and the like. A limited response is appropriate only because public policy considerations do enter into spoliative action upon a rule or at least an aberant of rule such as this Court is here asked to affirm. It is no less in the public interest to vitiate convictions where jurisdiction is obtained in clear defiance of the Federal Kidnapping Act than, say, to set aside convictions arising out of entrapment or coerced confessions. The motivation or justification for kidnapping by police authorities is based on an extreme pre-supposition that the suspect is guilty before he is tried. This violates every concept of our jurisprudence touching upon liberty and justice. The policy aspect has been forcefully put by the lower Court (p. 19) in this language:

> "The courts of the United States should uphold the constitutional guarantee of due process of law by all

appropriate means within their lawful powers, including issuance in last resort cases of the writ of *habeas corpus*. Certainly, if evidence obtained by wire tapping be such dirty business as to be suppressed, and if every safeguard is to be placed against the securing of convicting evidence by unreasonable and unlawful search and seizure, a citizen, regardless of how depraved or vicious he may be, may not be seized, kidnaped and forcibly abducted from one state to another by police officers acting beyond their territorial jurisdiction in violation of a criminal law of the United States enacted to prevent kidnaping. Officers of the law are no less immune from the condemnation of the statute than are ordinary citizens; indeed, they should be held to strict accountability.

"To uphold criminal acts of either state or federal police officers who violate an explicit federal statute, by permitting a citizen kidnaped by them to be brought to trial and punishment in a jurisdiction to which he has been forcibly brought without warrant of law, would in practical effect lend encouragement to the commission of criminal acts by those sworn to enforce the law."

Congress, perhaps prompted by kidnappings differently motivated, has spoken upon a subject which, as suggested above, the courts, and this Court, have indicated has had a need for legislation. The existence of a specific, statutory criminal prohibition against interstate abductions requires reexamination by this Court of its earlier decisions and a ruling, in affirmance of the Court of Appeals, that a state trial court may not obtain jurisdiction of an accused fugitive in direct violation of that Act by which Congress has said that the transaction is criminally illegal.

* * * * *

2. Respondent is entitled to a District Court hearing upon the merits of his petition for writ of *habeas corpus* without

having exhausted his state court remedies, because of "exceptional circumstances".

Respondent has not gone through the mechanics of exhausting his State court remedies, if any, on the particular point of his abduction in violation of the Federal Kidnapping Act.[6] It would have availed him nothing had he attempted to do so. If there is any certainty of prediction, it is that the Supreme Court of Michigan would deny Respondent's plea for remedy, in whatever form sought, and that it would follow the "universal rule", to which Petitioner's brief frequently refers, of ignoring any impropriety by which jurisdiction of Respondent's person was obtained. That Court adhered to the "rule" as far back as 1902, *In re Little, supra,* saying at page 457 that "we feel compelled to follow the decision of the Supreme Court of the United States". As recently as 1950, the Michigan Supreme Court made it apparent in *People* v. *Maher*, 329 Mich. 155, aside from any factual finding, that it held as a matter of law that an attack on jurisdiction "is without merit" where such attack was founded on averment that defendant was abducted from Indiana by Michigan police officers.[7] Perhaps, then, the certainty that any application to the Michigan courts to avoid the conviction on this ground would be denied[8] is itself an exigency or exceptional circumstance, within the meaning of *Darr* v. *Burford*, 339 U. S. 200, which

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[6] Note that when Respondent filed his petition in 1950, the Court of Appeals had already ruled, *Brown* v. *Frisbie*, 178 F. (2d) 271 (1949), that another Michigan prisoner in like circumstances was not required to have exhausted his state remedies. Respondent, acting in proper person, did the obvious thing: he petitioned the United States District Court.

[7] Cf. *Hampson* v. *Smith*, 162 F. (2d) 334 (C. A. 9th, 1947), believed statutorily overruled by 28 U: S. C. Sec. 2254.

[8] Petitioner's brief, page 25, notes that the Supreme Court of Michigan "might possibly" have denied the filing of a delayed motion for new trial, not merely because of delay subsequent to trial but because the jurisdictional objection should have been interposed at or before trial.

justifies requiring the District Court to examine upon its merits the application for habeas corpus, without prior exhaustion of state remedies and without application for certiorari to this Court from a final State court ruling.[9] The complete lack of practical, substantive relief, as distinguished from a mere right to file papers in the state court procedures theoretically open to him, suggests "the existence of circumstances rendering such process ineffective to protect the rights of the prisoner" within the meaning of that exception to statutory limitation of the writ found in 62 Stat. 967; 28 U. S. C. Sec. 2254,[10] and within the related language in *Darr* v. *Burford, supra*, at page 210.

Respondent's position on the point is illustrated by the well known language found on page 118, *Ex parte Henry Hawk*, 321 U. S. 114, although Respondent has not duplicated Hawk's incomplete efforts:

> "But where resort to state court remedies has failed to afford a full and fair adjudication of the federal contentions raised, either because the state affords no remedy" (citing) "or because in the particular case the remedy afforded by the state proves in practice unavailable or seriously inadequate" (citing), "a federal court should entertain his petition for habeas

[9] Respondent does not concede that *In re Reno*, 321 Mich. 497, cited in Petitioner's brief, page 26, would be controlling. It is one thing to say that preliminary and procedural defects may be waived in a criminal case; it is quite another to claim that Respondent unwittingly waived the question of jurisdiction of the person if that jurisdiction was void *ab initio*. (And see *Johnson* v. *Zerbst*, 304 U. S. 458, at page 464, as to waiver of fundamental rights.) But if Petitioner's view of *In re Reno* be correct, it further emphasizes the unavailability or serious inadequacy of State court remedies and the applicability of that portion of 28 U. S. C., Sec. 2254, above quoted.

[10] As far back as the dissent in *Mahon* v. *Justice, supra*, it was thought that the inherent power of Federal courts to issue the writ for relief of violations of the spirit rather than the letter of the Constitution should be used in Respondent's situation; "the exigency has arisen in which the law applies." See page 289 of 127 U. S.

corpus, else he would be remediless. In such a case he should proceed in the federal district court . . . ."

* * * * *

The revealing footnote in the Court of Appeals opinion (p. 20), and its citations of Eastern District of Michigan cases, argue forcefully that the "exceptional circumstances" which avoid the necessity of exhausting the state court remedies and of petition thereon for certiorari to the Supreme Court need not be personal or lie within the particular case. The Court of Appeals plainly said, from its coign of vantage, that these exceptional circumstances exist and that they warrant application of the "special circumstances" exception to this case: That officers of the State of Michigan have been "forcibly abducting and kidnaping from other states and bringing, without warrant of law or extradition, persons charged with crime into the State of Michigan for trial" (p. 20); further, that an impasse exists between the Court of Appeals and the District Court for the Eastern District of Michigan thereon, despite *Brown* v. *Erisbie*, *supra;* that the recited decisions of the District Court uphold or encourage illegal police forays identical to that suffered by Respondent.[11] Exceptional circumstances these are indeed, and although not peculiarly personal to Respondent except as his relief is sought through that particular Federal jurisdiction, they are exceptional circumstances in the public interest, and they are here urged in further support of the position that Respondent should not be precluded from relief because he has not exhausted his State court remedies (if any).

* * * * *

[11] Re-illustrating the public policy problem earlier referred to, and the need for statutory "public peace along the borders of the several states" (*Mahon* v. *Justice*, *supra*), all of which will be put in focus by affirmance of the Court of Appeals' ruling in the instant cause.

Petitioner's brief emphasizes that Respondent had the benefit of counsel at trial. Whether that has been true in his subsequent efforts to obtain freedom is not in this record; it is gathered that all of his efforts have been in proper person. This Court said, *Ex parte Davis*, 318 U. S. 412, that poverty of a prisoner does not, of itself, excuse him from exhausting all available state remedies. Yet it is apparent that a combination of lack of legal training, poverty and the practical futility of state court remedies, is powerful and persuasive upon the lower courts.

Potter v. *Dowd*, 146 F. (2d) 244 (C. C. A. 7th, 1944);
Thomas v. *Duffy*, 191 F. (2d) 360 (C. A. 9th, 1951);
Boyd v. *O'Grady*, 121 F. (2d) 146 (C. C. A. 8th, 1941);
Ex parte Morgan, 78 F. Supp. 756 (D. C. S. D. Cal., C. D., 1948); aff'd., 175 F. (2d) 404; Cert. denied, 338 U. S. 827.

These ingredients vary in proportions in cases such as the above. The lack of state remedy may be more apparent in one case than another; but the plight of the prisoner through ignorance, lack of counsel or abuse is easily read in the "exceptional circumstances" which each court finds, a catalytic upon the companion finding that the state courts offered no real succor. So it was in *Potter* v. *Dowd, supra*, an opinion antedating Sec. 2254 of Title 28 but which fits itself into the exceptions tolerated in *Ex parte Hawk, supra*, which were directly given "legislative recognition" [12] in the Code. In *Thomas* v. *Duffy, supra*, the fact that the element of time precluded regular procedures was sufficiently dramatic to incite the court's ruling, but the petitioner's personal limitations and the "conduct by state officers" (Cf. the arresting Michigan officers in the case at bar) were a part of the exigencies which justified the Court

[12] *Darr* v. *Burford, supra*, page 210.

of Appeals in finding that the requirement of "exhaustion" was obviated. When justice requires, these courts have found, and subsequent to *Ex parte Hawk, supra,* that an habeas corpus petitioner has, in the words of an older opinion, a

> "rare case and peculiar urgency where the petitioner had no fair prospect of securing full and complete protection of the rights guaranteed by the federal constitution through habeas corpus proceedings, even by appeal to the court of last resort in the State." (*Boyd v. O'Grady, supra,* at page 148.)

The fact that Respondent, a prisoner of limited background, has not subsequent to trial raised, perhaps had not even thought to raise prior to *Brown* v. *Frisbie, supra,* in the State courts the question of jurisdiction illegally obtained in violation of the Federal Kidnapping Act, now presents the problem of whether he is not to be excused for failure to exhaust in the State courts an issue which had neither been specifically raised nor decided in this Court or elsewhere. If there is no case law upon the point, it would be most technical to preclude Respondent because he had not the ingenuity to envision a new issue and himself carry it through the State court procedures, thence to this Court, and taking care to avoid the pitfalls collected and discussed in *Darr* v. *Burford, supra.*

VII

Conclusion

The District Court for the Eastern District of Michigan had, under the circumstances, the jurisdiction to entertain the petition, resolve the factual issues and to issue the writ of habeas corpus.

For the reasons herein urged, and for the additional reasons and authorities set forth in the opinion of the

Court of Appeals, it appears that this Court should hold that violation of the Federal Kidnapping Act voids the jurisdiction of the Michigan trial court which was obtained solely by such illegality and, in the particular premises, affirm the order of the Court of Appeals irrespective of Respondent's failure to exhaust State court remedies.

It is respectfully requested that the order of the United States Court of Appeals for the Sixth Circuit, which remanded the cause to the United States District Court for hearing upon the merits, be affirmed.

Respectfully submitted,

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